Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-9 OF 2011(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ
14 DECEMBER 2011

Contract — Termination — Notice of termination — Main contractor applied for moratorium order — Whether issuance of moratorium order would activate cl 25(2) of PAM contract — Whether respondents were liable in trespass and conversion — Counterclaim — Oral contract — Whether proven — Whether respondents succeeded on counterclaim — Companies Act 1965 s 176(1), (3) & (10) — PAM building contract cl 25

Evidence — Documentary evidence — Minutes of meeting — Admissibility of — Whether Court of Appeal had based its decision on inadmissible evidence — Oral contract — Whether there was sufficient oral evidence to prove oral contract

Words and Phrases — 'Making' — Interpretation of — Clause 25(2) of PAM Building contract — PAM building contract cl 25

One Autoways Constructions Sdn Bhd ('Autoways') was appointed as the appellant's main contractor to construct an office building ('the project'). Autoways then appointed the respondents as subcontractors to perform various functions under the project. When Autoways petitioned the court under s 176(1) of the Companies Act 1965 ('the Act') for approval of a scheme of composition with its creditors, the appellant claimed that cl 25(2) of the PAM building contract was triggered, which caused an automatic termination of the main contract between the appellant and Autoways. The appellant thus issued a termination letter to Autoways. Although Autoways disputed the right of the appellant to invoke cl 25(2) of the PAM contract, it vacated the project site. Thereafter, the respondents, on the authorisation of Autoways, re-entered the project site without giving notice to the appellant and removed from the site their plants, tools, equipment and goods, which allegedly damaged or destroyed temporary buildings on the project site. The appellant sued the respondents for trespass and conversion. The respondents in turn filed a counterclaim for individual sums owed to them directly by the appellant, by relying on an alleged oral contract between the appellant and the subcontractors wherein the appellant had agreed to make direct payment to the sub-contractors to continue with the outstanding works on the site. The High

Court dismissed both the claim and the counterclaim with costs. However, on appeal the Court of Appeal dismissed the appellant's claim for trespass and conversion but allowed the respondent's counterclaim with costs. The Court of Appeal found that obtaining a moratorium order under s 176(10) of the Act did not activate the automatic termination of the PAM building contract and hence there was no trespass and conversion by the respondents. The Court of Appeal also found that the respondents had successfully established the existence of an oral contract whereby the respondents were induced to perform and complete the works. This was the appellant's appeal against that decision. The appellant maintained that the issuance of a moratorium order under s 176(10) of the Act activated cl 25(2) of the PAM contract; that since the PAM contract had been automatically terminated, Autoways had no authority to give consent to the respondents to enter the project site and that the latter were liable for trespass and conversion; and that the Court of Appeal had erred in finding that the existence of an oral contract had been established when this decision was based on a disputed document that was not admitted into evidence by the trial court.

Held, dismissing the appeal with costs:

(1) The granting of a moratorium order under s 176(10) of the Act did not activate cl 25(2) of the PAM contract. This was because the events mentioned in cl 25(2) were essentially instances of insolvency whereas the issuance of an order under s 176(10) of the Act was not necessarily an instance of insolvency. Thus s 176(10) of the Act did not have any bearing on cl 25(2) of the PAM contract (see paras 18–20).

(2) The court found that the word 'making', which was used in cl 25(2) of the PAM contract, had to be read as though the composition or arrangement with creditors had already been made. Thus it concluded that cl 25(2) of the PAM contract came into play only upon the happening of the event and not in the process of it. As such, the obtaining of a moratorium order under s 176(10) of the Act did not fall within the ambit of the 'making a composition or arrangement with his creditors' under cl 25(2) of the PAM contract. Clause 25(2) of the PAM contract was only activated when the court was called upon to approve the composition or arrangement as provided for under s 176(3) of the Act and unless and until that event happened, cl 25(2) of the PAM contract had no application (see paras 22–28).

(3) As the PAM contract had not been automatically terminated, Autoways had the authority to give the respondents consent to enter the project site. Hence there was no question of trespass or conversion by the respondents. Further, even though Autoways had surrendered physical possession of the site to the appellant it still had possession in law because the PAM contract was not validly terminated (see paras 30–32).

(4) Although the appellant had objected to the admissibility of the minutes of the meeting ('the minutes') wherein it was agreed that the appellant would make direct payment to the subcontractors at the trial, the trial judge had not ruled that the minutes were inadmissible. Therefore, the Court of Appeal did not commit any error in referring to the minutes in arriving at its decision. The Court of Appeal had not referred to evidence which had been ruled inadmissible and render it admissible. Instead it had attached due weight to the minutes. In any event, even if the minutes were not considered in evidence, there was other oral evidence raised at trial to show that there was an oral contract for direct payment to be made by the appellant to the subcontractors (see paras 40–45).

[Bahasa Malaysia summary

One Autoways Constructions Sdn Bhd ('Autoways') dilantik sebagai kontraktor utama perayu untuk membina sebuah bangunan pejabat ('projek tersebut'). Autoways kemudian melantik responden-responden sebagai subkontraktor untuk melaksanakan berbagai fungsi di bawah projek tersebut. Apabila Autoways mempetisyen mahkamah di bawah s 176(1) Akta Syarikat 1965 ('Akta ') untuk kelulusan skim kandungan dengan pemiutang-pemiutangnya, perayu menyatakan bahawa klausa 25(2) kontrak bangunan PAM dicetuskan, yang menyebabkan pembatalan secara automatik kontrak utama di antara perayu dan Autoways. Perayu dengan itu mengeluarkan surat pembatalan kepada Autoways. Walaupun Autoways mempertikaikan hak perayu untuk membangkitkan klausa 25(2) kontak PAM, ia mengosongkan kawasan projek. Kemudian, responden-responden, atas kuasa Autoways, memasuki semula kawasan projek tanpa memberikan notis kepada perayu dan mengeluarkan daripada kawasan tersebut loji mereka, perkakas, alat-alat dan barang-barang, yang didakwa dirosakkan dan memusnahkan bangunan sementara di kawasan projek. Perayu menyaman responden-responden bagi pencerobohan dan pemindahan. responden-responden sebaliknya memfailkan tuntutan balas bagi jumlah peribadi yang dihutang kepada mereka secara langsung oleh perayu dengan menyandar atas dakwaan kontrak lisan di antara perayu dan subkontraktor tersebut di mana perayu bersetuju untuk membuat bayaran terus kepada subkontraktor untuk meneruskan dengan kerja-kerja di kawasan tersebut. Mahkamah Tinggi menolak kedua-dua tuntutan dan tuntutan balas dengan kos. Walau bagaimanapun, atas rayuan Mahkamah Rayuan menolak tuntutan perayu bagi pencerobohan dan pemindahan tetapi membenarkan tuntutan balas responden dengan kos. Mahkamah Rayuan mendapati bahawa pemerolehan perintah moratorium di bawah s 176(10) Akta tersebut tidak mencetuskan pembatalan automatik kontrak bangunan PAM dan dengan itu tidak ada pencerobohan dan pemindahan oleh responden-responden. Mahkamah Rayuan juga mendapati bahawa responden-responden telah berjaya membuktikan kewujudan kontrak lisan di mana responden-responden didorong untuk melaksanakan dan menyelesaikan kerja-kerja tersebut. Ini

adalah rayuan perayu terhadap keputusan tersebut. Perayu mengekalkan bahawa pemberian perintah moratorium di bawah s 176(10) Akta tersebut mencetuskan klausa 25(2) kontrak PAM; bahawa oleh sebab kontrak PAM terbatal secara automatik, Autoways tidak ada kuasa untuk memberikan persetujuan kepada responden-responden untuk memasuki kawasan projek dan bahawa responden-responden bertanggungan bagi pencerobohan dan pemindahan; dan bahawa Mahkamah Rayuan telah terkhilaf dalam penemuan bahawa kewujudan kontrak lisan telah dibuktikan apabila keputusan ini adalah berdasarkan kepada dokumen yang dipertikaikan yang tidak dimasukkan sebagai keterangan oleh mahkamah bicara.

Diputuskan, menolak rayuan dengan kos:

(1) Pemberian perintah moratorium di bawah s 176(10) Akta tersebut tidak mencetuskan klausa 25(2) kontrak PAM. Ini adalah kerana kejadian yang dinyatakan di dalam klausa 25(2) adalah pada asasnya melibatkan kebankrapan manakala pemberian perintah di bawah s 176(10) Akta tidak semestinya melibatkan kebankrapan. Dengan itu, s 176(10) Akta tidak mempunyai apa-apa kesan kepada klausa 25(2) kontrak PAM (lihat perenggan 18–20).

(2) Mahkamah mendapati bahawa perkataan 'making', yang digunakan di dalam klausa 25(2) kontrak PAM, mesti dibaca seperti kandungan atau penyusunan dengan pemiutang-pemiutang telah pun dibuat. Maka ia memutuskan bahawa klausa 25(2) kontrak PAM beraplikasi hanya apabila berlaku kejadian tersebut dan bukan semasa proses kejadiannya. Dengan itu, pemerolehan perintah moratorium di bawah s 176(10)Akta tidak terangkum dalam 'making a composition or arrangement with his creditors' di bawah klausa 25(2) kontrak PAM. Klausa 25(2) kontrak PAM hanya dicetuskan apabila mahkamah dipanggil untuk meluluskan kandungan atau penyusunan seperti yang diperuntukkan di bawah s 176(3) Akta dan kecuali dan sehingga kejadian tersebut berlaku, klausa 25(2) kontrak PAM tiada aplikasi (lihat perenggan 22–28).

(3) Oleh sebab kontrak PAM tidak pernah dibatalkan secara automatik, Autoways mempunyai kuasa untuk memberikan responden-responden kelulusan untuk memasuki kawasan projek. Maka, tidak ada persoalan pencerobohan atau pemindahan oleh responden-responden. Selanjutnya, walaupun Autoways telah menyerahkan milikan fizikal kawasan tersebut kepada perayu ia masih mempunyai milikan dalam undang-undang kerana kontrak PAM tidak dibatalkan secara sah (lihat perenggan 30–32).

(4) Walaupun perayu membantah kepada pemasukan minit mesyuarat ('minit tersebut') di mana dipersetujui bahawa perayu akan membuat bayaran terus kepada subkontraktor semasa perbicaraan, hakim bicara tidak memutuskan bahawa minit tersebut tidak boleh diterima. Dengan

itu, Mahkamah Rayuan tidak melakukan apa-apa kekhilafan dalam merujuk kepada minit tersebut dalam mencapai keputusannya. Mahkamah Rayuan tidak merujuk kepada keterangan yang telah diputuskan sebagai tidak boleh diterima dan memutuskannya sebagai boleh diterima. Sebaliknya ia memberikan penekanan yang sewajarkan kepada minit tersebut. Walau bagaimanapun, jika minit tersebut tidak dipertimbangkan sekalipun, terdapat keterangan lisan yang lain yang dibangkitkan semasa perbicaraan untuk menunjukkan bahawa terdapat kontrak lisan untuk pembayaran terus dibuat oleh perayu kepada subkontraktor (lihat perenggan 40–45).]

Notes

For cases on documentary evidence in general, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1283–1511.

For cases on notice of termination, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6114–6116.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd [2006] 5 MLJ 1, FC (refd)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 CLJ 1, FC (refd)

Autoways Constructions Sdn Bhd lwn Desa Samudra Sdn Bhd & Anor [1999] MLJU 427; [1999] 4 CLJ 601, HC (refd)

Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd [1996] 2 MLJ 517, FC (refd)

Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors [2009] 8 MLJ 335, HC (refd)

JKP Sdn Bhd v PPH Development (M) Sdn Bhd [2007] 6 MLJ 239; [2007] 3 CLJ 621, CA (refd)

Lyle-Meller v A Lewis & Co (Westminster) Ltd [1956] 1 All ER 247 (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

New Zealand Insurance Co Ltd v Sinnadorai [1969]1 MLJ 183, FC (refd)

Shaikh Sahied bin Talip bin Jaafar bin Talip v Khoo Kang Chek [1934] 1 ML J 283, SC (refd)

Sinnadorai v New Zealand Insurance Co Ltd [1968] 2 ML J 70 (refd)

Television Broadcasts Ltd & Ors v Golden Line Video & Marketing Pte Ltd [1989] 1 MLJ 201 (also [1998] 1 SLR 930), HC (refd)

Legislation referred to

Companies Act 1965 ss 176, 176(1), (3), (10)

Appeal from: Civil Appeal No W–02–1094 of 2009 (Court of Appeal, Putrajaya)

Cyrus Das (RM Krishnan & Harvinderjit Singh with him) (Kumar Partnership) for the appellant.
N Chandran (Mahendran Chelliah & Ranjan Chandran with him) (RR Chelliah Brothers) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] With leave of this court granted on 21 February 2011 the following questions are posed before us for our consideration, namely:

(a) whether cl 25(2) of the PAM Standard Form Building Contract of Malaysia is triggered causing an automatic termination of the main contract if the contractor petitions the court under s 176(1) of the Companies Act 1965 for approval of a scheme of composition with its creditors;

(b) whether a restraining or moratorium order issued by the court under s 176(10) of the Companies Act 1965 in favour of the contractor is proof of the 'making of a composition or arrangement' with creditors for the purpose of cl 25(2) of the PAM building contract;

(c) whether under the PAM standard form building contract possession of a project site reverts back to the employer regardless of whether the termination of the contract is disputed by the main contractor;

(d) upon the project site reverting to the employer, could the main contractor under the PAM contract consider itself released from the terms of the contract and/or authorise the subcontractors to enter upon the site and remove goods and materials without the consent of the employer or the project architect;

(e) whether the torts of conversion and trespass to goods committed by several tortfeasors attract liability on a joint and several basis for the total value of the goods or materials that are the subject matter of trespass and conversion; and

(f) whether the Court of Appeal could judicially base its decision on a disputed document that was not admitted into evidence by the trial court

[2] We heard learned counsel for the parties and reserved our decision. Having given the arguments submitted our anxious consideration we now

deliver our decision.

BACKGROUND

[3] Briefly, the facts surrounding the case have been thoroughly elucidated by the High Court and the said judgment can be found at *Desa Samudra Sdn Bhd v Autoways Construction Sdn Bhd & Ors* [2009] 8 MLJ 335. The Court of Appeal in its broad grounds of reasons did not repeat the facts of the case with great detail. We propose to do the same and highlight only the relevant and pertinent facts for the purposes of this appeal.

[4] The appellant herein is the owner of Wisma E & C which is an office building located in Damansara Heights. One Autoways Constructions Sdn Bhd ('Autoways') was engaged as main contract under a PAM building contract to construct the said office building. the appellant was the employer. Autoways was originally named as the first defendant in the court of first instance, but as it had already been wound up, it did not participate at the trial.

[5] The respondents on the other hand are subcontractors appointed by Autoways to perform various functions under the project. The individuals named as respondents, namely the second and fourth respondents, are principals of the respective subcontractors. The fifth and sixth respondents are related to the counterclaim only.

[6] The crux of the case surrounds cl 25(2) of the PAM building contract which provides for automatic termination of the contract upon the happening of certain events. The pertinent event is the main contractor 'making a composition or arrangement with his creditors'. In this respect, a termination letter dated 26 June 1998 was issued by the appellant upon learning that Autoways made an application to the court under s 176 of the Companies Act 1965.

[7] Autoways maintained that it disputed the right of the appellant to invoke cl 25(2) but nevertheless vacated the site and reverted possession back to the appellant.

[8] The present dispute arose from events which occurred on 2 August 1998. On the authorisation of Autoways, the first to fourth respondents (as subcontractors and their principal officials) re-entered the site without giving notice to the appellant or the architect and removed plants, tools, equipment and goods, and in the process damaged or destroyed temporary buildings by stripping off mechanical and electrical installations.

[9] Premised on that, the appellant sued the subcontractors in trespass and conversion for RM695,000. The subcontractors in response filed a counterclaim for individual sums owing to them directly by the appellant based on an alleged oral contract said to be made at a meeting on 14 April 1998. In essence, the alleged oral contract effectively stipulates that the appellant had undertaken to pay the subcontractors whatever sums owed to them by Autoways as a result of the latter's financial difficulties.

[10] The High Court on 6 May 2009 found that as the PAM building contract was validly terminated under cl 25(2) of the same read together with s 176(10) of the Companies Act 1965, Autoways had ceased to be the main contractor and could not have validly given consent to the subcontractors to enter the site. Hence, the High Court found the subcontractors to be liable for trespass and conversion, but could not award damages because the appellant had failed to prove which subcontractor did and took what. The counterclaim brought by the subcontractors was also dismissed on the ground that the alleged oral contract for direct payment made on 14 April 1998 was not proven on the balance of probabilities. In short, both the claim and counterclaim were dismissed with costs. As such, both parties appealed.

[11] The Court of Appeal on 2 September 2010 reversed the High Court's decision on several grounds. First, the Court of Appeal was of the view that obtaining a moratorium order under s 176(10) of the Companies Act 1965 did not activate the automatic termination of the PAM building contract, and as such the contract between the appellant and Autoways was not validly terminated. It followed that by reason thereof, Autoways remained the main contractor and could validly give consent to the respondents to enter the site, and accordingly there was no trespass and conversion by the respondents. The Court of Appeal also found that the respondents had successfully established the existence of an oral contract made on 14 April 1998 whereby a binding obligation was created for direct payment to be made to the respondents to continue and complete the pending works. The Court of Appeal proceeded to dismiss the appellant's claim for trespass and conversion, and allowed the respondent's counterclaim with costs.

OUR DECISION

[12] For the reasons below, we would dismiss this appeal with costs and affirm the decision of the Court of Appeal.

REASONS

[13] Due to the fact that they are closely related, we shall answer questions one and two together and so too questions three and four since they are

essentially related to the PAM building contract. Questions five and six are stand alone questions respectively.

Questions one and two — effect of s 176 of the Companies Act 1965

[14] This is perhaps the most crucial question raised by the appellant which begs an answer. It is essentially the effect which ss 176(1) and 176 (10) of the Companies Act 1965 has in relation to cl 25(2) of the PAM building contract.

[15] Now, s 176(1) states the following:

> Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the Court directs.

[16] And s 176(10) stipulates as below:

> Where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the Court imposes.

[17] The material part of cl 25(2) of the PAM building contract is termed as follows:

> In the event of the Contractor becoming a bankrupt or making a composition or arrangement with his creditors or having a winding up order made … the employment of the Contractor under this Contract shall be forthwith automatically determined but the said employment may be reinstated and continued if the Employer and Contractor his trustee in bankruptcy liquidator receiver or manager as the case may be shall so agree.

[18] We will deal with the second question first, ie the effect of s 176(10) because it would help narrow down the broad scope of discussion under the first question. The sole point for consideration on this question is whether the issuance an order under the s 176(10) of the Companies Act would activate cl 25(2) of the PAM contract. Although compelling at first glance, we

respectfully do not agree with the appellant's stand. We accordingly find that the granting of a moratorium order under s 176(10) does not activate cl 25(2). A

[19] Our simple rationale for this is that the events mentioned in cl 25(2) are essentially instances of insolvency. An application (and also the granting of the same) under s 176(10) is not an instance of insolvency. It may for all necessary purposes be that insolvency is probable or imminent, but at the stage of such an application, the main contractor cannot be said to be insolvent. It should be borne in mind that there have been instances where companies have bounced back after being granted s 176(10) orders — some make it whereas others do not. B C

[20] In short, s 176(10) does not have any bearing on cl 25(2). This brings us to the first question which deals with s 176(1). Now, it is pertinent to note that a moratorium order under s 176(10) was in actual fact obtained. However, no compromise or arrangement had been agreed upon and approved by the court as per the other provisions of s 176. D

[21] Now, the appellant's contention strongly hinges upon the words 'making a composition or arrangement with his creditors' as stipulated in cl 25(2). The appellant argues by reason of the usage of the word 'making', it was intended that a composition or arrangement need not necessarily be made. In other words, a proposal to enter into the same would suffice. The High Court was in agreement with that interpretation. The Court of Appeal disagreed. E F

[22] Having considered all the arguments we are in agreement with the approach by the Court of Appeal. It is a matter of interpretation of the phrase: 'making a composition or arrangement with his creditors.' For instance, the words 'the making of the article …' was given the grammatical construction of 'the actual making of the article' and not otherwise (See *Television Broadcasts Ltd & Ors v Golden Line Video & Marketing Pte Ltd* [1989] 1 MLJ 201 (also [1998] 1 SLR 930)). G

[23] Hence, we are of the view that although the word 'making' is used, it must for all necessary purposes be read as the composition or arrangement has been made. In other words it must necessarily be a step further than a mere proposal to enter into composition or arrangement. It is akin to provisions where words such as 'upon the entering of a judgment' or 'upon the happening of an event' — whereby the judgment has to be entered or the event has to happen before it could be said that the provision has been activated. H I

[24] We do not think that the PAM building contract intends to automatically terminate contracts whereby the main contractor possibly has financial difficulties. If indeed the PAM building contract agreement intends to

cover such situations, it must state so expressly. After all proposals of schemes of composition or arrangements do not necessarily materialise at all times.

[25] We find further support in our view by the words adopted in cl 25(2) itself, ie 'but the said employment may be reinstated and continued if the Employer and Contractor *his trustee in bankruptcy liquidator receiver or manager* as the case may be shall so agree'. (Emphasis added.) also leads us to conclude that cl 25(2) seemingly comes into play only upon the happening of the event and not in the process of it. Those persons or bodies mentioned in the emphasis highlighted above would be where the event has actually happened.

[26] Indeed cl 25(2) also uses the words 'becoming a bankrupt' and also 'having a winding up order made'. It is beyond doubt that the said clause intends for the bankruptcy orders to have been entered or the winding order to have been made. That to our mind is akin to 'making a composition or arrangement with his creditors'. The words 'becoming', 'making' and 'having' are of the similar grammatical tense, namely present tense (or perhaps even present continuous tense). We find no merit in the appellant's argument that the usage of the present tense would result in the interpretation of cl 25(2) read together with s 176.

[27] Thus, with respect, we are inclined to disagree with the conclusion arrived at by the High Court in an earlier case involving the similar parties, ie *Autoways Constructions Sdn Bhd lwn Desa Samudra Sdn Bhd & Anor* [1999] MLJU 427; [1999] 4 CLJ 601. Instead, we prefer to follow the approach adopted by the High Court in *Sinnadorai v New Zealand Insurance Co Ltd* [1968] 2 ML J 70. When dealing with a similar provision the learned judge there concluded that such a provision is only activated once the event has happened. No doubt the decision in that case was reversed by the then Federal Court but it was on a different ground altogether (see *New Zealand Insurance Co Ltd v Sinnadorai* [1969]1 MLJ 183). In other words, the then Federal Court did not disapprove the interpretation of the said provision by the learned judge. We would therefore for practical reasons adopt such an interpretation.

[28] Accordingly, we are of the view that the obtaining of a moratorium order under s 176(10) does not fall within the ambit of the 'making a composition or arrangement with his creditors'. Similarly, the presentation of a proposal of a scheme of composition or arrangement to the court is not by itself sufficient to activate cl 25(2). Clause 25(2) is only activated when the court is called upon to approve the composition or arrangement as provided for under s 176(3). Unless and until that event happens, cl 25(2) has no application.

Questions three and four — project site reverting back upon termination

[29] Our simple answer to question three is that it would necessarily depend on the validity of the termination. No doubt the general rule is that termination of the PAM building contract would result in the project site reverting back to the employer. However, if indeed the termination was unlawful and/or unjustified, an exception to the general rule would arise.

[30] In the present case the question is whether Autoways had the authority to give consent to the respondents to remove their materials from the site after the PAM contract has been terminated. It is our considered view that whether or not Autoways had the authority to do so would depend on whether the PAM contract had been validly terminated or otherwise. As a consequence of the answers to the first two questions posed, it follows that the PAM contract had not been automatically terminated and thus Autoways had the authority to give the said consent to the respondents. Hence, there is no question of trespass or conversion by the respondents. As such, question four does not arise and there is no need for us to address the same.

[31] We find it necessary to add a few words to this scenario. We are of the opinion that a distinction ought to be drawn between 'possession in fact' and 'possession in law'. We accept that 'possession' can be broadly divided into possession in fact (physical control) and possession in law (legal control) (see generally *Shaikh Sahied bin Talip bin Jaafar bin Talip v Khoo Kang Chek* [1934] 1 MLJ 283 where the court (Simpson J) observed that — 'Possession is primarily divisible into possession in fact (physical control) and possession in law'). What we mean to say is that although the main contractor may not have possession in fact, it may still retain possession in law. Applying it to the present situation, it is not in dispute that Autoways did in actual fact vacate the site. Hence, the appellant did indeed take over the site upon the said termination. Accordingly, the appellant did physically have possession of the site — this is what we mean by possession in fact. However, legal possession remained with Autoways because the PAM contract was not validly terminated — this is what we mean by possession in law.

[32] Hence, we find ourselves in agreement with the views of Professor Vincent Powell-Smith in *The Malaysian Standard Form of Building Contract-PAM 1969* where he opined that 'Although there is no express provision that on determination the contractor must give up possession of the site, it is suggested that he is bound to do so, even if he is disputing the grounds or validity of the determination'. That, to our mind, is with reference to the physical possession of the site — ie possession in fact. We add that even though the contractor has surrendered possession of the site back to the employer, that by itself does not affect the position that the contractor may still have possession in law — the

latter situation being dependant on whether the contract was validly terminated in the first place.

Question five

[33] This question deals with the liability of joint tortfeasors towards the total value of the subject matter where trespass or conversion has been established. Now, in this case we have already found that neither trespass nor conversion has been established. Thus, this issue need not be addressed. However, this question raises general importance and thus we feel obliged to say a few words on this subject matter.

[34] We accept that joint tortfeasors may be jointly and severally liable for the total amount of the subject matter where a tort action has successfully been established. But that itself would necessarily depend on the facts and circumstances of the case. It is very much a factual issue. We would therefore decline to lay down a hard and fast rule for this. But it is for the court to consider whether or not the acts of tort are said to be indivisible (see *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1).

[35] Even assuming that this issue is still relevant in this case we find that in the present circumstances each of the subcontractors (including the respondents) would have only taken their respective materials out of the site. It would be a grave injustice to hold them for materials taken out by other subcontractors or damage and injuries caused by them. In short, we are of the view that the facts of the present case do not justify imputing full liability on the respondents for the damage and injury which had been caused jointly by the acts of the subcontractors on that day.

Question six — status of document not admitted in evidence

[36] This question relates to an important evidential and procedural issue. It also has crucial bearing in the determination of this appeal. In the event that we are wrong in our findings with regard to s 176 of the Companies Act 1965 and cl 25(2) of the PAM building contract, we are of the view that the appeal should be dismissed on this ground. This ground is the cross appeal raised by the respondents in the Court of Appeal which was allowed.

[37] The general rule is that document not admitted in evidence by the trial court should not be relied upon by an appellate court. The appropriate approach when dealing with a situation where the ground for appeal is that a document was wrongfully rejected by the trial court would be for the appellate court to rule on its admissibility and if found to be favourable, to order the

matter to be remitted back for trial and that the document be admitted before the trial court and subjected to cross-examination. Of course, there are instances where an appellate court may consider new evidence not raised at trial — but that is a different matter altogether and of no concern here.

[38] However, in the present case the question posed by the appellant does not reflect the actual position of the document in dispute. The document in question is the minutes of meeting dated 14 April 1998 whereby it was allegedly agreed that the appellant would make direct payment to the subcontractors to continue with the outstanding works on the site.

[39] The appellant seems to take the stand that the said minutes was not tendered in evidence (and hence the manner in which the question was posed). The respondents on the other hand argued that the said minutes in actual fact formed part of the agreed bundle at trial and was in fact extensively referred to by the parties at trial as D9–12. The respondents acknowledges that at trial, the appellant did object to the said minutes, but that the court merely noted down the objection and proceeded. At no point was it rules that the said minutes were inadmissible. Parties continued to refer to the minutes thereafter.

[40] We therefore agree with the respondents' argument. In the law governing documentary evidence, as in oral evidence, three matters come to mind — relevancy, admissibility, and weight. They must be considered in that order. Only evidence which is relevant ought to be admissible. Irrelevant evidence should be rendered as inadmissible and the matter ends there. Now, relevant evidence which is rendered admissible is still subject to the element of weight. The court can either attach due weight to the evidence, or some weight, little weight, or no weight at all. Due regard must be given to the authenticity of the evidence, its source, its contents, and more importantly, the surrounding circumstances of the case. This is where contemporaneous evidence would come in handy.

[41] Having considered the circumstances of the case, we are of the view that the said minutes were part of the agreed bundle of documents and were indeed referred to extensively by the parties. An objection was raised and noted at the outset, but at no point did the learned trial judge rule that the said minutes were inadmissible. The mere fact that a document is disputed or objected to does not by itself render the document inadmissible. Parties continued to refer to the minutes at trial as D 9–12. Hence, the appellant's approach to the question posed is a non starter in actual fact.

[42] To our mind, the only issue in question is the weight that ought to be attached to the said minutes. And in arriving at this juncture, we state for the record that we are of the view that the Court of Appeal did not commit any

error in referring to the said minutes in arriving at its decision. The Court of Appeal did not (as the appellant seems to portray) refer to evidence which had been ruled as inadmissible and render it admissible, and base its decision on the same. All it did was to attach due weight to the said minutes. We are of the view that appellate courts are perfectly entitled to do the same (see *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 CLJ 1; *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd* [2006] 5 MLJ 1; and *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517.)

[43] Indeed, the overwhelming contemporaneous evidence as pointed out by the Court of Appeal such as the fact that there had been payment on two previous occasions after the meeting goes to show that indeed there was an oral contract for direct payment to be made by the appellant to the subcontractors. Indeed, there being a legally binding relationship between the appellant and the respondents (see: *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247), the appellant must be estopped from asserting that there was no such oral contract. (See *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.)

[44] In any event, even if the minutes were not considered in evidence, we are of the view that there was sufficient oral evidence raised at trial to show that there was indeed an oral agreement to the effect as alluded to above.

[45] Accordingly, we find that there was an oral contract between the parties to the present appeal whereby the respondents were induced to perform and complete the works. This is not only established by the said minutes but by other contemporaneous evidence and also circumstantial evidence. We also note and endorse the approach taken by the Court of Appeal in *JKP Sdn Bhd v PPH Development (M) Sdn Bhd* [2007] 6 MLJ 239; [2007] 3 CLJ 621 whereby a slightly similar situation occurred.

CONCLUSION

[46] Accordingly, we are of the view that the PAM building contract was not automatically terminated by reason of the existence of a proposed scheme of composition or arrangement or by the granting of a moratorium order under s 176 of the Companies Act. As such, the main contractor was legally authorised to give consent to the subcontractors to remove the latter's materials from the site and as such the appellant's action in trespass and conversion cannot sustain. As for the respondents' claim, we are of the view that there was an agreement between the appellant and the respondents that the former would make direct payment to the latter to complete the works. The appellant's breach of this agreement towards the tail end of the project entitled the respondents to succeed in their counterclaim.

[47] We accordingly find no reason to disagree with the findings and decision of the Court of Appeal. Therefore, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan